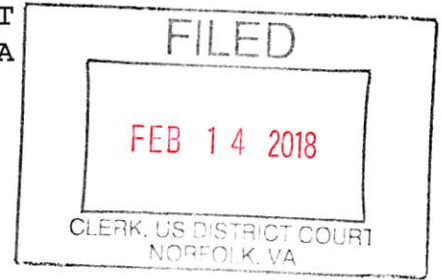


UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division



TYVONE FREEMAN,

Petitioner,

v.

CIVIL ACTION NO. 2:17cv76

HAROLD CLARKE, Director,
Virginia Department of Corrections,

Respondent.

ORDER

This matter comes before the court on the Motion to Dismiss, filed by the Respondent on April 27, 2017, ECF No. 11, which requested the court to dismiss the Petitioner's Petition under 28 U.S.C. § 2254 for a Writ of Habeas Corpus ("§ 2254 Petition"). ECF No. 1. The matter was referred to United States Magistrate Judge Douglas E. Miller, pursuant to provisions of 28 U.S.C. § 636(b)(1)(B) and (C), and Federal Rule of Civil Procedure 72(b), to conduct hearings, including evidentiary hearings, if necessary, and to submit to the undersigned proposed findings of fact, if applicable, and recommendations for the disposition of the Motion.

The United States Magistrate Judge's Report and Recommendation ("R&R") was filed on December 22, 2017, ECF

No. 21. The Magistrate Judge recommended that the Respondent's Motion to Dismiss be granted as to the Petitioner's claims of prosecutorial vindictiveness, and be denied as to the Petitioner's claims of ineffective assistance of counsel. R&R at 34-35. By copy of the R&R, the parties were advised of their right to file written objections thereto. Id. at 35-36. On January 5, 2018, the Respondent filed an Objection to the R&R, challenging the recommendation that the ineffective assistance of counsel claims proceed. ECF No. 22. On January 25, 2018, the court received the Petitioner's Response to the Respondent's Objection. ECF No. 31. On February 5, 2018, the Respondent filed a Reply to the Petitioner's Response. ECF Nos. 39-40.

The court, having examined the Respondent's Objection to the R&R, and having made de novo findings with respect thereto, does hereby **OVERRULE** the Respondent's Objection, and **ADOPT AND APPROVE IN FULL** the findings and recommendations set forth in the R&R. Accordingly, the Respondent's Motion to Dismiss is **GRANTED IN PART** with respect to the claims of prosecutorial vindictiveness, and **DENIED IN PART** with respect to the claims of ineffective assistance of counsel. The Petitioner's claim of prosecutorial vindictiveness is hereby **DISMISSED**, and the Petitioner may proceed on the claims of ineffective assistance of counsel.

Additionally, the Petitioner filed a Motion for an Evidentiary Hearing, ECF No. 32; a Motion to Appoint Counsel, ECF No. 33; and a Motion for Relief, requesting the court set aside or overturn his conviction, ECF No. 38. The court **GRANTS** the Petitioner's Motion for an Evidentiary Hearing on the ineffective assistance of counsel claim. See Harris v. Nelson, 394 U.S. 286, 291-92 (1969) (stating that federal courts must grant evidentiary hearings to petitioners "upon an appropriate showing"). Because an evidentiary hearing is warranted, the court **GRANTS** the Petitioner's Motion to Appoint Counsel, pursuant to Rule 8(c) of the Rules Governing Section 2254 ("If an evidentiary hearing is warranted, the judge must appoint an attorney to represent a petitioner who qualifies to have counsel appointed under 18 U.S.C. § 3006A."). The court will appoint counsel to represent the Petitioner for the limited purpose of this hearing, and will do so forthwith.


After counsel is appointed by the court, an evidentiary hearing will be scheduled. The court **WITHOLDS RULING** on the Petitioner's Motion for Relief, until after the evidentiary hearing on, and disposition of, the ineffective assistance of counsel claims. No appeal may yet be taken in this case, until disposition of all claims in this habeas corpus action.

The Clerk is **DIRECTED** to send a copy of this Order to the Petitioner; to John Rockecharlie, the Petitioner's former

counsel; to the Petitioner's newly appointed counsel; and to
counsel for the Respondent.

IT IS SO ORDERED.

/s/
Rebecca Beach Smith
Chief Judge



REBECCA BEACH SMITH
CHIEF JUDGE

February 14, 2018